IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1021

MICHAEL R. WOOD,

Petitioner,

-vs-

FIVE POINTS SHOPPING CENTER,

Respondent.

Certiorari To The United States Court of Appeals

For The Ninth Circuit

REPLY IN SUPPORT OF CERTIORARI

MICHAEL R. WOOD
1266 Coast Village Road
Santa Barbara, CA 93108
[805] 969-5935

Counsel for Petitioner
Pro Se

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I

THIS ACTION WAS PROPERLY REMOVED
IRRESPECTIVE OF RESPONDENT'S ARGUMENT,
HOWEVER PROPER REMOVAL
IS NOT THE PRIMARY ISSUE HERE.

In the respondent's brief filed in response

to petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, the respondent acknowledges that Thermtron Products Inc. v Hermansdorfer, 423 U.S. 336 (1976) permits a review of the court's order of remand when a case is remanded for reasons not recognized by 28 U.S.C. §1447(c) however respondent attempts to distinguish the case at bar as being unparallel to Thermtron by contending that it was improperly removed.

In support of these contentions, the respondent retrieved information stated in its Affidavit in Support of Respondent's Motion to Remand filed in the United States District Court for the Central District of California and realleged the fact that its principal place of business is in the State of California.

Additionally, respondent circumvents the issue of diversity of citizenship by relying on 28 U.S.C. §1441(b) which deals exclusively with jurisdiction on removable civil actions based on presence of federal question. As alleged in

petitioner's petition, the question of diversity comes under 28 U.S.C. §1441(a) which states:

> "Any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States . . ."

Clearly, this action was brought in the State court as a civil action with diversity of citizenship of defendants and monetary jurisdiction met under 28 U.S.C. §§1332(a)(1) and §1332(a) respectively. 28 U.S.C. §§1332(a) and §1332(a)(1) further clarify the the language of 28 U.S.C. §1332(a), viz. "original jurisdiction":

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs and is between -
> (1) citizens of different states"

However, the petitioner has demonstrated that this case was properly removed by placing into the District Court's record an affidavit and certified copies of State of Nevada documents

showing the respondent's principal place of business as being in Reno, Nevada and that respondent is incorporated in the State of Nevada.

Curiously enough, the respondent is once again attempting to reallege what it alleged in the District Court, i.e. that this case was improperly removed for lack of diversity of citizenship by misleading the court in using another corporation's principal place of business, namely MacDonald Management Corporation Corporation (which is a California corporation) which is <u>not</u> the same principal place of business as Five Points Shopping Center, the respondent in said action, for purposes of establishing noncompliance with the criteria for diversity as outlined in 28 U.S.C. §1332(a)(1) and §1332(c). Five Points Shopping Center is a Nevada corporation with its principal place of business in Reno, Nevada.

It is settled that the petitioner is a

citizen of Nevada per 28 U.S.C. §1332(c).

Regarding respondent's contentions that the amount in controversy is deficient pursuant to 28 U.S.C. §1332(a), the amount in controversy in the instant action relates to the contract, which entire amount exceeds $100,000, in that this controversy turns on the interpretation of the "lawful money of the United States" clause contained therein regarding the mode of payment of the entire contract, Brotherhood of Locomotive Firemen and Enginemen v Pinkston, 293 U.S. 96, 55 S Ct 1, 79 L.Ed. 219 (1934). As the entire contract amount is in excess of $10,000, 28 U.S.C. §1332(a) is satisfied.

Let there be no doubt that the procedures for removal, 28 U.S.C. §1446, were complied with by the petitioner.

Notwithstanding proper removal, the essential issue to bring this case within the bounds of Thermtron is use of grounds not authorized by statute to decide to remand. This

issue has been properly raised so respondent's arguments concerning propriety of removal should not be considered.

II

THE DISTRICT COURT JUDGE USED DISCRETIONARY GROUNDS TO REMAND AND NOT THOSE PERMITTED BY THE CONTROLLING STATUTE.

The respondent argues that ". . . it is quite obvious that the Order of Remand was granted for reasons set forth in 28 U.S.C. §1447(c) . . .", p. 8, line 10, respondent's brief, and further states that "Judge Gray first noted that he felt the case had not been properly removed and then, perhaps unfortunately, remarked that he was not disposed to try this particular kind of case under any circumstances", p. 10, lines 13-17, respondent's brief.

Judge Gray did not "first note" at the hearing on respondent's motion to remand that he felt the case had not been properly removed. The proper sequence of Judge Gray's thoughts is exemplified in his statement, p. 3, line 24;

p. 4, line 6, Tr. 8/18/80:

> *"Well, I can't resolve the unlawful detainer case,* but it does seem to me based upon the papers I have received that there probably is no diversity. Even if there is diversity, less than $10,000 is involved and it seems to me all that what the defendant is trying to do here is forestall or delay an unlawful detainer action which is part and parcel of state law."

In this quote, Judge Gray's predisposition against unlawful detainer cases is "first noted". Thereafter, Judge Gray mentioned proper removal by saying "there probably is no diversity" and later still, with his *"unfortunate remark"* as respondent refers to it, p. 10, lines 15, 16, respondent's brief, Judge Gray reaffirmed his position against unlawful detainer cases by stating *"This Court is not disposed to try an unlawful detainer case"*, p. 6, line 25; p. 7, line 1, Tr. 8/18/80.

Far from being "obvious" that the remand order was imposed for reasons set forth in 28 U.S.C. §1447(c), it becomes more obvious that Judge Gray decided the action on other than

statutory grounds.

At page 7, line 5, Tr. 8/18/80, Judge Gray stated:

> *"I am not in a position to determine whether or not it was frivolous to have brought* [this action] *it here."* [Emphasis added.]

Perhaps Judge Gray's use of the word "frivolous" was to mean unlawful or improvident, thus expressly declaring he was not using statutory grounds to remand.

Furthermore, the record is replete with evidence of proper removal. Similarly evident, from the district court transcript, is the fact that Judge Gray gave cursory attention to this substantial evidence. These two points render Judge Gray's decision to remand suspect and illuminate the fact that discretionary grounds were the actual point of departure for the decision to remand.

For these reasons there is sufficient evidence that Judge Gray subrogated discretionary grounds for those in 28 U.S.C. §1447(c) which

brings this case within the bounds of Thermtron.

CONCLUSIONS

For the reasons set forth above, the respondent's arguments are without merit and should be disregarded.

Certiorari should therefore be granted to insure that a question affecting all federal courts does not go unattended and that the petitioner is not denied a lawful remedy; "Remedies for rights are ever favorably extended." 18 Vin. Abr. 521.

Respectfully submitted,

Michael R. Wood
1266 Coast Village Road
Santa Barbara, CA 93108
[805] 969-5935

Counsel for Petitioner
Pro Se